

**PERSATUAN PEGAWAI-PEGAWAI BANK
SEMENANJUNG MALAYSIA**

A

v.

**KETUA PENGARAH KESATUAN SEKERJA, MALAYSIA
& ORS**

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HIGH COURT MALAYA, KUALA LUMPUR
ABANG ISKANDAR J
[JUDICIAL REVIEW NO: R1-25-54-2011]
1 JUNE 2012

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ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application for - Application to quash recognition given by Director-General of Trade Unions to Kesatuan Eksekutif Bank Islam Malaysia Berhad - Whether decision arrived at erroneously - Whether breach of natural justice - Whether exceptional circumstances shown - Rules of the High Court 1980, O. 53*

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ADMINISTRATIVE LAW: *Judicial review - Certiorari - Whether judicial review available when alternative internal remedy of appeal available - Application for certiorari to quash recognition given by Director-General of Trade Unions to Kesatuan Eksekutif Bank Islam Malaysia Berhad - Whether appeal should have been made to Minister - Trade Unions Act 1959*

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LABOUR LAW: *Trade Union - Recognition of members - Bank officers - Application for certiorari to quash recognition given by Director-General of Trade Unions to Kesatuan Eksekutif Bank Islam Malaysia Berhad - Whether respondent's decision contrary to Trade Unions Act 1959, s. 12(2) - Whether trade union can be registered when there is in existence another trade union - Whether creating multiplicity of trade unions catering for same occupation - Whether appeal should have been made to Minister instead of judicial review*

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The applicant had been the recognised union by the Director-General of Trade Unions, the first respondent ("R1") for all officers in all commercial banks in Malaysia in the job band commonly referred to as 'executives'. R1 however had in the meantime recognised the Kesatuan Eksekutif Bank Islam Malaysia Berhad ('KESATRIA'), the second respondent ('R2') who actually had been composed of executive officers of Bank Islam Berhad, the third respondent ("R3"). The applicant was aggrieved by the recognition by R1 granted to R2 and thus made this application for a judicial review under O. 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash the decision of R1 that had granted recognition on R2. It was claimed that R1's decision had been arrived at erroneously and was actually contrary to s. 12(2) of the Trade Unions Act 1959 ('TUA'). While conceding that R1 had the discretion to register a trade union as envisaged under that section, the

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- A applicant contended that the discretion may not be exercised in favour of registering a trade union if R1 was satisfied that there was in existence a trade union and that it was not in the interest of the workmen concerned that there be another trade union in respect thereof. This is so as to avoid a multiplicity of trade unions that would cater for the same particular occupation, in this case the executive officers of commercial banks.
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Held (dismissing application with costs):

- C (1) The applicant had not shown exceptional circumstances as to why this matter ought to be brought before the court when in fact and in law, there was in existence a provision in the TUA for an appeal to be made to the Minister by the applicant if it was not satisfied with the decision of R1 in registering R2 as an in-house trade union within R3 bank. (para 8)
- D (2) R1 was properly clothed with the necessary legal authority to deal with the registration of R2. There was no breach of natural justice that would have jeopardized the applicant and there was no evidence showing blatant failure on the part of R1 in the performance of her statutory duty. The ‘exceptional circumstances’, as laid down in *Government of Malaysia & Anor v. Jagdis Singh* had not been shown by the applicant that would otherwise have justified them coming to the court for the prerogative relief. On this ground alone, this application must fail; *Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* (refd). (para 8)
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- F (3) The applicant did not in fact represent the members of R2. Although the applicant was a national union representing the executive officers in the banking industry, it was clearly established that the members of R2 being executives in the Grade10-12 were not represented by the applicant. The applicant admittedly represented the executive officers in Grade 9 and above in R3. (para 9)
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- H (4) Section 12(2) of the TUA does not totally prohibit registration of a union although there is already in existence a union registered for the particular classification of employees, for instance, the executive officers in a bank. The factual situation in this case showed that there could indeed be blind spots in individual banks that would create injustice to a group of employees, who although they may be in the executive category, were nevertheless not represented in a collective way as to put them in a position of perceived disadvantage when negotiating with their employer for favourable terms in the collective agreements. R1 was satisfied that in registering the establishment of R2 as an in-house union in R3, it would not cause
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injustice. In fact, as the applicant did not represent the members who would make up R2, R1 was correct in having registered R2 as an in-house trade union in R3. (para 9) A

(5) In exercising the court's supervisory jurisdiction in dealing with this kind of application for a *certiorari* to issue, it is trite law that it is primarily concerned with the decision-making process and it is only in limited circumstances that a review court will wade into the propriety of the decision that is being impugned, in terms of its merits. (paras 9 & 10) B

(6) R1 had the necessary discretionary power to act in a manner befitting the circumstances before her as conferred under s. 12(2) of the TUA. (para 12) C

Case(s) referred to:

Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1948] 1 KB 223 (refd) D

British American Tobacco (Malaysia) Bhd Employees Union v. Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors [2011] 7 CLJ 478 HC (refd)

Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC (foll)

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah [2004] 2 CLJ 777 FC (refd) E

Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 9 CLJ 505 FC (refd)

Legislation referred to:

Rules of the High Court 1980, O. 53

Trade Unions Act 1959, ss. 2(1), 12(2) F

For the applicant - Chandra Segaran; M/s P Kuppusamy & Co

For the 1st respondent - Suhaila Harun; SFC

For the 2nd respondent - Yum Shirley; M/s Ramesh Yum & Co

For the 3rd respondent - S Shalini; M/s Lee Hishamuddin Allen & Gledhill G

Reported by Amutha Suppayah

JUDGMENT

Abang Iskandar J: H

[1] The background facts are within the knowledge of all parties and I do not wish to repeat them here in extensor. They could be gleaned with relative ease from the cause papers that had been filed accompanying this application as well as the papers filed by both the R1 and R2 in opposition thereto. But suffice for me to outline in brief the crux or the gist of the complaints that had since bedeviled the applicant. I

- A [2] In this case, the applicant had been the recognised union by the Director-General of Trade Unions, the first respondent ('the R1'), for all officers in all commercial banks in Malaysia in the job band commonly referred to as 'executives'. The R1 however had in the meantime recognised the Kesatuan Eksekutif
- B Bank Islam Malaysia Berhad ('KESATRIA'), the second respondent ('the R2') who actually had been composed of executive officers of Bank Islam Berhad, the third respondent ('the R3'). The applicant was thus aggrieved by the recognition by R1 granted to the R2.
- C [3] The applicant had therefore made this application for a judicial review under O. 53 RHC 1980, for an order of *certiorari* to be issued by this court to quash the said decision of the R1 that had granted recognition on the R2.
- D [4] This application was grounded upon to complaints trained at the impugned decision of the R1. One of the complaints raised had been that, the said decision was arrived at erroneously and was actually contrary to s. 12(2) of the Trade Unions Act 1959 which expressly has stated as follows:
- E The Director-General may refuse to register a trade union in respect of a particular establishment, trade, occupation or industry if he is satisfied that there is in existence a trade union representing the workmen in that particular establishment trade, occupation or industry and it is not in the interest of the workmen concerned that there be another trade union in respect thereof.
- F [5] While conceding that the R1 has the discretion, given under the said section to register a trade union as envisaged under that section, it was contended by the learned counsel for the applicant
- G that the same discretion may not be exercised in favour of registering a trade union "if he is satisfied that there is in existence a trade union and that it is not in the interest of the workmen concerned that there be another trade union in respect thereof".
- H [6] Clearly therefore there is, *ipso facto*, a desire to avoid a multiplicity of trade unions that would cater for the same particular occupation, in this case, that would be the executive officers of the commercial banks and that the D-G may not register a trade union where there already exists a trade union that represents the workmen in the particular occupation. That caveat is put in place
- I when it is not in the interest of the workmen concerned that there be established another trade union in respect of the same

occupation. The words of the said section refer to the satisfaction on the part of the D-G in deciding whether to register another trade union. But that satisfaction cannot be achieved without there being a prior act on the part of the D-G to duly consider.

[7] Having heard the submissions by all the learned counsels in this case, I would under the circumstances respectfully agree with the able submissions of both the learned counsels for the R1 and R2 in that this application for judicial review be dismissed on more than one ground.

[8] First, the applicant has not shown exceptional circumstances as to why this matter ought to be brought before this court when in fact and in law, there is in existence a provision in the Trade Unions Act 1959, for an appeal to be made to the Minister by the applicant if it was not satisfied with the decision of the D-G in registering the R2 as an in-house trade union within the R3 bank. The D-G was properly clothed with the necessary legal authority to deal with the registration of the R2. There was no breach of natural justice that would have jeopardised the applicant and there was no evidence showing blatant failure on the part of the R1 in the performance of her statutory duty. These 'exceptional circumstances', as laid down in the *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 case had not been shown by the applicant that would otherwise justified them come running to this court for the prerogative relief that it was seeking (*Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 9 CLJ 505) from this court. The decision in the Federal Court case of *Robin Tan Pang Heng* [*supra*] is clear in that regard. On that ground alone, this application must fail.

[9] Secondly, even assuming for a moment that this court was wrong in so deciding against the applicant based on the failure to resort to and to first exhaust the available internal remedy by way of an appeal to the Minister, however, having gone through the evidence in the various relevant affidavits concerned in this application, I am of the view that on due consideration of the issues raised by the applicant, on their merits, this court is not able to accede to the submissions put forward by the learned counsel for the applicant. From a study of the affidavits, I am in agreement with the learned counsel for the R1 in that the applicant did not in fact represent the members of the R2. Although the applicant was a national union representing the

- A executive officers in the banking industry, it was clearly established in the affidavit evidence that the members of the R2 being executives in the Grade 10-12 were not represented by the applicant. The applicant admittedly represented the executive officers in Grade 9 and above in the R3. Section 12(2) of the
- B TUA 1959 does not totally prohibit a registration of a union although there is already in existence a union registered for the particular classification of employees, for instance, the executive officers in a bank. The factual situation in this case has shown that there could indeed be blind spots in individual banks that
- C would create injustice to a group of employees, who although they may be in the executive category, they were nevertheless not represented in a collective way thus putting them in a position of perceived disadvantage when negotiating with their employer for favourable terms in the collective agreements. The R1 was satisfied
- D that in registering the establishment of the R2 as an in-house union in the R3, it would not cause injustice. In fact, as the applicant did not represent the members who would make up the R2, the R1 was therefore correct in having registered R2 as an in-house trade union in the R3. There was no duplicity created
- E as a result of this exercise. The R2 is merely going to be a limited in-house trade union catering for the interest of executive employees in the R3 bank whose interests had been blind-sided by the applicant, wittingly or otherwise. The decision in the case of *British American Tobacco (Malaysia) Bhd Employees Union v. Ketua*
- F *Pengarah Kesatuan Sekerja, Malaysia & Ors* [2011] 7 CLJ 478, is clearly instructive in that regard, where learned Justice Zawawi Salleh there had noted that the intention of Parliament, in inserting s. 2(1) had been to encourage the flourishing of trade unionism and to enable the legitimising of in-house unions in spite
- G of the existence of national unions. While that amendment had enabled in-house unions to be established despite there already existed a national union, that power is not a *carte blanche* for wanton establishment of such unions. In exercising that power, the decision maker is circumscribed, in the sense that he must be
- H satisfied that justice, not injustice, will be achieved in such exercise. Therefore such power will not be exercised capriciously. It is the duty of this court as a review court, to ensure that such power is exercised within reason with due regard to the relevant factors in the circumstances of a particular case.
- I [10] Coming back to this case, there was ample evidence that the R1 had consulted the members of the R2 and since the applicant did not cater for the R2's interest in the R3 bank, it would be

stretching it too far to say that the applicant had been denied its right to be heard by the R1, thus allegedly occasioning a breach of the principles of natural justice by the R1. A short shrift to that argument put forth by learned counsel for the applicant would be that in so far as the R2 was concerned, as the applicant did not represent its members, the latter were at best, strangers to the proceedings and that it was correct that the R1 had so decided the way it did, in the absence of the applicant. It is also to be noted that the legal provisions under consideration do not so provide and neither could it be reasonably inferred as of necessity, that such hearing be extended to persons such as the applicant in this case. That being so, the law is quite clear on that score, as stated by learned Justice Siti Normah FCJ in the case of *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777 where Her Ladyship had said that there cannot be a breach of duty where none exists in law.

[11] It is clear that the R1 had, in coming to her decision taken into consideration all the relevant factors and ignored the ones which were irrelevant. In all fairness it cannot be said that her decision had amounted to one that could be described as being perverse. Her decision has passed the *Wednesbury's* test as postulated in the celebrated case of *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223. Her decision was not one that was the product of an exercise in excess of her jurisdiction and neither was it an irrational one. In exercising this court's supervisory jurisdiction in dealing with this kind of application for a *certiorari* to issue, it is trite law that it is primarily concerned with the decision-making process and it is only in limited circumstances that a review court will wade into the propriety of the decision itself that is being impugned, in terms of its merits. This is because by and large the Parliament has in the Trade Unions Act conferred that discretion on the R1 to make the attendant decision. The review court, such as this court, will be very slow to interfere and in the words of Lord Greene MR in the *Wednesbury's* case (*supra*), among others, as a judicial authority, "it is concerned, and concerned only to see whether the executive have contravened the law by acting in excess of the powers which the Parliament has confided in them". In this case, the R1 had stated in her affidavit-in-reply to the applicant's affidavit-in-support, as follows:

Seksyen 12(2) Akta 262 memberi kuasa budi bicara kepada saya untuk menolak permohonan pendaftaran kesatuan sekerja sekiranya saya berpuashati bahawa telah ada suatu kesatuan sekerja mewakili

- A pekerja-pekerja dalam penubuhan, tred, pekerjaan atau industri tertentu dan bukan menjadi kepentingan pekerja-pekerja dalam pertubuhan, tred, pekerjaan atau industri tertentu untuk mengadakan suatu lagi kesatuan sekerja yang lain berkenaan dengannya.
- B [12] It is patently clear therefore that the R1 had the necessary discretionary power to act in a manner befitting the circumstances before her as conferred under s. 12(2) of the TUA 1959.
- C [13] In this case, she had concluded that although she had the discretion not to register a trade union whereby there already existed a trade union that would cater for executives of bank employees, however, she was satisfied that the R2 would be comprised of bank employees who were not at the moment represented by an union including the applicant. The R1 had stated in the same affidavit-in-reply as follows:
- D Walau bagaimanapun, di dalam kes ini, saya telah berpuashati bahawa pada masa permohonan pendaftaran dibuat, tiada kesatuan sekerja yang mewakili pegawai-pegawai Gred G10-G12 di Bank Responden Ketiga dan adalah menjadi kepentingan bagi pegawai-pegawai Gred G10-G12 tersebut untuk diwakili oleh sesebuah kesatuan sekerja.
- E [14] Viewed against the above stipulations of what the functions of this court are, it can hardly be said that the R1 has been guilty of any such breach when she had decided the way she did. There was definitely no illogicality inherent in the embodiment of that decision, especially the manner in which it was arrived at by
- F the R1. To my mind too, a reasonable tribunal similarly circumstanced, would have come to the same decision as did the R1 in this case.
- G [15] In the upshot, I agree with the learned Senior Federal Counsel acting for the R1 and the learned counsel for the R2 that this has not been a fit and proper case whereby this court ought to exercise its power by issuing the prerogative writ of *certiorari* to quash the decision of the R1 that was impugned by the applicant in this case.
- H [16] Premised on the above, this application was therefore dismissed by me with costs. The applicant is ordered to pay costs of RM3,000 each to the R1 and the R2 and it is further ordered that the applicant to pay costs of RM1,000 to the R3.
- I [17] Order accordingly.
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